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3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
5 OAKLAND DIVISION

6
7 STACY L. WEISCHEDEL,

8 Petitioner,

No. C 12-3232 PJH (PR)

9 vs.

**ORDER DISMISSING
PETITION**

10 RANDY TEWS,

11 Respondent.
12 _____ /

13 Petitioner, a federal prisoner incarcerated at F.C.I. Dublin has filed a pro se petition
14 for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The original petition was
15 dismissed with leave to amend and petitioner has filed an amended petition.

16 **DISCUSSION**

17 **A. Standard of Review**

18 A district court must determine at the outset whether a petition filed by a federal
19 prisoner is pursuant to 28 U.S.C. § 2241 or 28 U.S.C. § 2255, because congress has given
20 jurisdiction over these petitions to different courts. *Hernandez v. Campbell*, 204 F.3d 861,
21 865-66 (9th Cir. 2000). A petition under § 2241 must be heard in the district of
22 confinement, whereas if the petition is properly brought under § 2255, it must be heard by
23 the sentencing court. *Id.* at 865.

24 A federal prisoner who seeks to challenge the legality of confinement must generally
25 rely on a § 2255 motion to do so. See *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir.
26 2006) ("The general rule is that a motion under 28 U.S.C. § 2255 is the exclusive means by
27 which a federal prisoner may test the legality of his detention, and that restrictions on the
28 availability of a § 2255 motion cannot be avoided through a petition under 28 U.S.C. §

1 2241." (citation omitted)). There is, however, an exception to that general rule. Under the
2 "escape hatch" of § 2255, a federal prisoner may file a § 2241 petition if, and only if, the
3 remedy under § 2255 is "inadequate or ineffective to test the legality of his detention." *Id.*
4 (internal quotation marks omitted). We have held that a prisoner may file a § 2241 petition
5 under the escape hatch when the prisoner "(1) makes a claim of actual innocence, and (2)
6 has not had an unobstructed procedural shot at presenting that claim." *Id.* at 898 (internal
7 quotation marks omitted).

8 **B. Legal Claims**

9 Petitioner entered a guilty plea in the District of Montana in 1998. She states that a
10 direct appeal was denied and no other post conviction relief has been sought. Petitioner
11 does not allege that she is actually innocent of the crime, rather she claims that she was
12 improperly sentenced and that certain sentencing enhancements were improper. Petitioner
13 challenges the sentencing enhancements for vulnerable victim and reckless endangerment
14 during flight. These arguments do not raise a claim of actual innocence for a § 2241
15 petition. See *Marrero v. Ives*, 682 F.3d 1190, 1193 (9th Cir. 2012) (petitioner's escape
16 hatch argument that he should not have qualified as a career offender in sentencing is not
17 one of actual innocence). Even if petitioner's claims could be construed as actual
18 innocence claims, she has failed to show that she did not have an unobstructed procedural
19 shot at presenting these claims. In fact, petitioner raised the vulnerable victim claim on
20 direct appeal that was denied in a published opinion. *U.S. v. Weischedel*, 201 F.3d. 1250,
21 1255 (9th Cir. 2000). Petitioner does not allege that she was unable to bring the reckless
22 endangerment during flight claim either on direct appeal or in a § 2255 motion. To the
23 extent petitioner wishes to raise these claims she must file a § 2255 motion in the District of
24 Montana, but this § 2241 petition must be denied.

25 **CONCLUSION**

26 The petition is **DISMISSED** for the reasons set forth above. A Certificate of
27 Appealability is **DENIED** because reasonable jurists would not find the court's dismissal
28 debatable or wrong. See *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (standard). The

1 clerk shall close the file.

2 **IT IS SO ORDERED.**

3 Dated: March 8, 2013.


4 PHYLLIS J. HAMILTON
United States District Judge

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